[redacted]

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 19[redacted]

[redacted]

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

[redacted]

Attorneys for Petitioner

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1923

CHARLES O. LINDER,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

W. H. PLUMMER,
TURNER, NUZUM & NUZUM,
Attorneys for Petitioner.

GEORGE TURNER,
of Counsel.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, Charles O. Linder, respectfully represents:

First: That at the April Term, 1922, of the United States District Court for the Eastern District of Washington, Northern Division, the Grand Jury empanelled for said term and in session duly returned into court an indictment against this petitioner in the words and figures following:

UNITED STATES OF AMERICA

Eastern District of Washington, Northern Division,
United States District Court.
April Term, 1922.
Indictment.

FIRST COUNT.

The Grand Jurors of the United States chosen, selected and sworn in and for the Northern Division of the Eastern District of Washington, upon their oaths present:

That CHARLES O. LINDER, whose other or true name is to the Grand Jurors unknown, hereinafter in this indictment called the defendant, late of the

County of Spokane, State of Washington, heretofore, to-wit: On or about the thirtieth day of March, 1922, at Spokane, in the Northern Division of the Eastern District of Washington, and within the jurisdiction of this Court, did then and there violate the Act of December 17, 1914, entitled "An Act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, preparations, and for other purposes," as amended February 24, 1919, in that he did then and there knowingly, wilfully and unlawfully sell, barter and give to Ida Casey a compound, manufacture and derivative of opium, to-wit: A quantity of morphine, the exact amount being to the Grand Jurors unknown, not in pursuance of any written order of Ida Casey on a form issued for that purpose by the Commissioner of Internal Revenue of the United States; that the defendant was a duly licensed physician and registered under the Act; that Ida Casey was a person addicted to the habitual use of morphine and cocaine and known by the defendant to be so addicted; that Ida Casey did not require the administration of morphine by reason of any disease other than such addiction; that the defendant did not

dispense any of the morphine for the purpose of treating any disease or condition other than such addiction; that none of the morphine so dispensed by the defendant was then and there administered to or intended by the defendant to be administered to Ida Casey by the defendant or any nurse, or person acting under the direction of the defendant; nor *were* any of the morphine then and there consumed or intended to be consumed by Ida Casey in the presence of the defendant, but that all of the morphine was put in the possession or control of Ida Casey with the intention on the part of the defendant that Ida Casey would use the same by self-administration in divided doses extending over a period of time, the amount of morphine dispensed being more than sufficient or necessary to satisfy the craving of Ida Casey therefor if consumed by her all at one time; that Ida Casey was not in any way restrained or prevented from disposing of the morphine in any manner she saw fit and that the morphine so dispensed by the defendant was in the form in which said drugs are usually consumed by persons addicted to the habitual use thereof to satisfy their craving therefor and were adapted for consumption. Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT II.

And the Grand Jurors aforesaid upon their oaths do further present:

That CHARLES O. LINDER, whose other or true name is to the Grand Jurors unknown, hereinafter in this indictment called the defendant, late of the County of Spokane, State of Washington, heretofore, to-wit: On or about the first day of April, 1922, at Spokane, in the Northern Division of the Eastern District of Washington, and within the jurisdiction of this Court, did then and there violate the Act of December 17, 1914, entitled "An Act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, preparations, and for other purposes," as amended February 24, 1919, in that he did then and there knowingly, wilfully and unlawfully sell, barter and give to Ida Casey a compound, manufacture and derivative of opium, to-wit: One (1) tablet of morphine and a compound, manufacture and derivative of coca leaves, to-wit: Three (3) tablets of cocaine, not in pursuance of any written order of Ida Casey on a form issued for that purpose by the Commissioner

of Internal Revenue of the United States; that the defendant was a duly licensed physician and registered under the Act; that Ida Casey was a person addicted to the habitual use of morphine and cocaine and known by the defendant to be so addictetd; that Ida Casey did not require the administration of either morphine or cocaine by reason of any disease other than such addiction; that the defendant did not dispense any of the drugs for the purpose of treating any disease or condition other than such addiction; that none of the drugs so dispensed by the defendant was administered to Ida Casey by the defendant or any nurse, or person acting under the direction of the defendant; nor were any of the drugs consumed or intended to be consumed by Ida Casey in the presence of the defendant, but that all of the drugs were put in the possession or control of Ida Casey with the intention on the part of the defendant that Ida Casey would use the same by self-administration in divided doses over a period of time, the amount of each of said drugs dispensed being more than sufficient or necessary to satisfy the cravings of Ida Casey therefor if consumed by her all at one time; that Ida Casey was not in any way restrained or prevented from disposing of the drugs in any manner she saw fit and that the drugs so dispensed by the defendant were in the form in

which said drugs are usually consumed by persons addicted to the habitual use thereof to satisfy their cravings therefor and were adapted for consumption. Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT III.

And the Grand Jurors aforesaid upon their oaths do further present:

That CHARLES O. LINDER, whose other or true name is to the Grand Jurors unknown, hereinafter in this indictment called the defendant, late of the County of Spokane, State of Washington, heretofore, to-wit: On or about the twenty-ninth day of March and subsequent dates, the last date being about April first, 1922, at Spokane, in the Northern Division of the Eastern District of Washington and within the jurisdiction of this Court did then and there violate the Act of December 17, 1914, entitled "An Act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, preparations, and for other purposes," as amended February 24, 1919, in

that being a duly licensed physician and registered under the terms of said act, he did then and there knowingly, wilfully, illegally and unlawfully dispense and distribute a compound, manufacture and derivative of opium, to-wit: Morphine and a compound, manufacture and derivative of coca leaves, to-wit: Cocaine, the exact amounts being to the Grand Jurors unknown, to one Ida Casey, not in the course of the legitimate pursuit of his profession, nor for the purpose of effecting a cure of a habit, but for the purpose of keeping her comfortable by satisfying her craving for narcotic drugs, she, the said Ida Casey being at the time addicted to the use of morphine and cocaine and being what is commonly known and called a "dope fiend"; which said fact was then and there known to the defendant and that the said defendant did on each of said dates fail to keep a proper record of the date, the name and address of the person to whom, and the purpose for which said morphine and cocaine was dispensed and distributed as required by law. Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

FRANK R. JEFFREY,
United States Attorney,

HAL J. COLE,
Foreman.

A true bill.

Presented to the Court by the foreman of the Grand Jury in open court, in the presence of the Grand Jury and filed in the United States District Court, June 26, 1922.

ALAN G. PAINE,
Clerk.

By A. P. RUMBURG,
Deputy.

Second: That petitioner pleaded not guilty to said indictment, and at the October Term of said court a jury was empanelled in said court to determine the guilt or innocence of the petitioner of the offense therein charged, which said jury, after hearing the evidence offered on each side, the argument of counsel and the charge of the court, rendered a verdict finding petitioner guilty on the second count of the indictment, and not guilty on the first and third counts of the idictment.

Third: That thereafter at said term the said District Court rendered judgment on said verdict, and adjudged that petitioner be confined in the jail of Spokane County for the period of two months from the date of the sentence, and that he pay a fine of one

thousand dollars, and that he stand committed until duly discharged by law.

Fourth: That thereafter, and on January 6, 1923, a writ of error was prosecuted by petitioner from the judgment of said District Court to the Circuit Court of Appeals of the United States for the Ninth Circuit, and thereupon the records and proceedings were duly certified to said Circuit Court of Appeals, in the manner prescribed by law, as appears from the transcript of the record filed herewith.

Fifth: That such proceedings were had in the said Circuit Court of Appeals that on the 9th day of July, 1923, at a regular term of said court, an opinion was handed down affirming in all things the judgment of the District Court as aforesaid, and at a later date an order was made by said Circuit Court of Appeals denying a petition presented by petitioner for a rehearing. No mandate has yet been sent down to the said District Court because of an order of the said Circuit Court of Appeals staying the time until October 9, 1923, to give this petitioner an opportunity to present to this court his petition for a writ of *certiorari.* sent to this court his petition for a writ of certiorari.

Sixth: Your petitioner respectfully represents that the second count of the said indictment fails to state

facts constituting an offense against the laws of the United States, and that if said facts constitute an offense within the letter or spirit of the Act of Congress entitled, "An Act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax on all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, preparations and for other purposes," approved December 7, 1914, and the amendments thereto, approved February 24, 1919, then that the said Act, to that extent, is unconstitutional, null and void, and of no effect. Petitioner begs leave to refer to his brief, filed herewith, in explanation and elucidation of the contention that said second count fails to state an offense, and that the Act of Congress upon which the indictment is based is unconstitutional.

Your petitioner believes that the aforesaid judgment of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under

the seal of this court, directed to the United States Circuit Court of Appeals, for the Ninth Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled, Charles O. Linder, plaintiff in error, vs. The United States of America, defendant in error, No. 3982, to the end that the said case may be reviewed and determined by this court as provided in Sec. 6 of the Act of Congress, entitled, "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved May 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

W. H. PLUMMER,

TURNER, NUZUM & NUZUM.

GEORGE TURNER,

Of Counsel.

UNITED STATES OF AMERICA,
STATE OF WASHINGTON, } ss.
COUNTY OF SPOKANE.

CHARLES O. LINDER, being first duly sworn, deposes and says: I am the petitioner in the above and foregoing petition; I have read the said petition, know the contents thereof, and believe the same to be true.

CHARLES O. LINDER.

Subscribed and sworn to before me this 20th day of September, A. D. 1923.

F. E. COFFEEN,

Notary Public for the State of Washington,
Residing at Spokane, Washington.

(Notarial Seal)

SEP 27

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1923

CHARLES O. LINDER,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN AID OF PETITION FOR WRIT OF CERTIORARI.

W. H. PLUMMER,
TURNER, NUZUM & NUZUM,
Attorneys for Petitioner.

GEORGE TURNER,
of Counsel.

STATEMENT.

The defendant was convicted on the second count of an indictment containing three counts and acquitted on the first and third counts. The second count reads as follows:

> "COUNT II. And the Grand Jurors aforesaid upon their oaths do further present:
>
> That CHARLES O. LINDER, whose other or true name is to the Grand Jurors unknown, hereinafter in this indictment called the defendant, late of the County of Spokane, State of Washington, heretofore, to-wit: on or about the first day of April, 1922, at Spokane, in the Northern Division of the Eastern District of Washington, and within the jurisdiction of this Court, did then and there violate the Act of December 17, 1914, entitled 'An Act to provide for the registration of, with Collectors of Internal Revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, preparations, and for other purposes,' as amended February 24, 1919, in that he did then and there knowingly, wilfully and unlawfully sell, barter and give to Ida Casey a compound, manufacture and derivative of opium, to-wit: one (1) tablet of morphine and a compound, manufacture and derivative of coca leaves, to-wit: three (3) tablets of cocaine, not in pursuance of any written order of Ida Casey on a form issued for that purpose by the Commissioner of Internal Revenue of the United States; that the defendant was a duly licensed physician and registered under the Act; that Ida Casey was a person addicted

to the habitual use of morphine and cocaine and known by the defendant to be so addicted; that Ida Casey did not require the administration of either morphine or cocaine by reason of any disease other than such addiction; that the defendant did not dispense any of the drugs for the purpose of treating any disease or condition other than such addiction; that none of the drugs so dispensed by the defendant was administered to or intended by the defendant to be administered to Ida Casey by the defendant or any nurse, or person acting under the direction of the defendant; nor were any of the drugs consumed or intended to be consumed by Ida Casey in the presence of the defendant, but that all of the drugs were put in the possession or control of Ida Casey with the intention on the part of the defendant that Ida Casey would use the same by self-administration in divided doses over a period of time, the amount of each of said drugs dispensed being more than sufficient or necessary to satisfy the craving of Ida Casey therefor if consumed by her all at one time; that Ida Casey was not in any way restrained or prevented from disposing of the drugs in any manner she saw fit and that the drugs so dispensed by the defendant were in the form in which said drugs are usually consumed by persons addicted to the habitual use thereof to satisfy their craving therefor and were adapted for consumption. Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

ARGUMENT.

FIRST.

The indictment follows literally that set out in United States vs. Behrman, 258 U. S. 280, except that the quantity of the drug dispensed in that case by and through a single prescription was 150 grains heroin, 360 grains morphine and 210 grains cocaine. In this case the quantity dispensed was one tablet of morphine and three tablets of cocaine. The quantity contained in each of the tablets is not alleged, but the term tablet is well understood. The Standard Dictionary defines tablet as " a definite portion or weight of drug brought by pressure and the addition of a gum into a solid form convenient for administering." A tablet, then, must be taken to contain such quantity of the drug as is appropriate to a single dose.

We submit that there is nothing in the indictment to negative that the drugs were dispensed in good faith in the ordinary course of professional practice. It is a well known fact that one of the means of treating addiction to morphine, or any of the habit forming drugs, is the administration of diminishing quantities of the drug until the addict is finally weaned away from the habit. The Internal Revenue Bureau calls

this the "reductive ambulatory treatment of addiction." That Bureau, moreover, while not giving its approval to the so-called "reductive ambulatory treatment" does recognize the propriety and necessity of administering the drug to addicts in certain cases. In a circular to narcotic agents, dated May 21, 1923, signed by R. A. Haynes, Prohibition Commissioner, and approved by D. H. Blair, Commissioner of Internal Revenue, it is said:

> "Addicts suffering from senility or the infirmities attendant upon old age, and who are confirmed addicts of years' standing may be, for the purpose of enforcing the law, treated as addicts suffering from incurable diseases. In such cases, where narcotic drugs are necessary in order to sustain life, a reputable physician may prescribe or dispense the minimum amount necessary to meet the absolute needs of the patient."

There is nothing in the indictment which negatives that the drugs were dispensed as a part of such a treatment of the addict, Ida Casey. On the contrary, the allegation that "defendant did not dispense any of the morphine for the purpose of treating any disease or condition other than such addiction," raises the necessary inference that the drug was dispensed for the purpose of treating such addiction; an inference which is strengthened by the further allegation that the drug was dispensed with the "intention that Ida Casey would

use the same by self administration in divided doses extending over a period of time."

As we read the case of United States vs. Behrman, *supra,* the indictment in which case was taken as a model in this, it was only the extraordinary quantity of the drug dispensed in that case—three thousand ordinary doses—that enabled the court to find in the acts charged in the indictment on infraction of the law. Mr. Justice Day said in that case:

> "It may be admitted that to prescribe a single dose, or even a number of doses, may not bring a physician within the penalties of the act."

Mr. Justice Holmes, in his dissenting opinion, concurred in by Mr. Justice Brandies and Mr. Justice McReynolds, could not see, even in the large quantity alleged to have been dispensed, an infraction of the Act. He said:

> "The indictment, for the very purpose of raising the issue that divides the court, alleges in terms that the drugs were intended by the defendant to be used by King in divided doses over a period of several days. The defendant was a licensed physician and his part in the sale was the giving of prescriptions for the drugs. In view of the allegation that I have quoted, and the absence of any charge to the contrary, it must be assumed that he gave them in the regular course of his practice, and in good faith."

But the majority of the court found in the unusual and unnecessary quantity of the drug prescribed, evidence to the contrary, and so held. We think the language of Mr. Justice Holmes strictly applicable to the present indictment, as also the qualifying language of Mr. Justice Day, and that we need not recur to the terms of the statute and the ordinary principles of criminal pleading in aid of our contention that the indictment in the case states no offense.

If the indictment states no offense, then we submit certiorari ought to issue. This court has granted the writ for the purpose of settling the proper practice in indictments in the Territory of Alaska.

Summers vs. United States, 231 U. S. 92.

Indictments for infractions of the narcotic act are much more numerous in the courts of the United States than indictments in Alaska, and whether an indictment in the language of that set out in the Behrman case is sufficient to charge an offense where the quantity of the drug dispensed is such as might reasonably be prescribed for the cure or necessary alleviation of an addict is important to be settled, especially in view of the somewhat uncertain intimation given in the Behrman

case. Indeed, misapprehension of intimations given by this court, leading to an erroneous decision in the lower court has been considered sufficient to justify the granting of the writ.

Grigsley vs. Russell, 222 U. S. 149.

The District Attorney and lower court in this case evidently considered the Behrman case as an authority for the form of indictment employed, although the quantity of drug dispensed was not unreasonable.

SECOND.

If the indictment states an offense within the statute, then we submit that the statute to that extent is unconstitutional.

The Narcotic Act of December 17, 1914, as amended February 24, 1919, is a revenue act, and the amendment of 1919 accentuates the revenue features of the act. The act, manifestly, was not intended to trench on the police power of the states, and ought not to be given an interpretation which would bring within its purview an act the cognizance of which properly belongs to the states. While this view is plainly inferable from the language of this court in United States vs. Jin Fuey Moy, 241 U. S. 394, and United States vs. Doremus, 249 U. S. 86, yet the lower courts almost

uniformly try these narcotic cases on the theory that the purpose of the statute was to punish physicians and others dispensing morphine or other narcotics to satisfy the cravings of drug addicts, even where all the revenue features of the act have been complied with, as registration, payment of the tax, and the making and keeping of the records required by the act. We submit that the United States has nothing to do with such acts. Whether the health and morals of their people require that such practices be repressed by penal sanction is for the states alone to determine. It seems to us, and we submit the suggestion with great deference, in view of certain expressions of this court, that Congress, under the guise of a taxation act, intended to provide such a system of taxation and registration as would secure publicity in the dispensation of narcotic drugs, accessible at all times, not only to its own officers, but to those of the states and the lesser municipalities, in order that the states, which alone have the right to determine to what extent such traffic imperils the health and morals of the people, and how far it ought to be limited, restrained or regulated by penal sanctions, might at all times have data to enable them to perform that office, and that that was as far as Congress intended to go, because it was as far as it could go, and that the penal provisions of the

act were all intended to be directed to the taxation and registration and publicity features. It follows, if this view be correct, that an act not trenching on one or the other of the purposes aforesaid cannot be within the purview of the act, or within the purview of the Constitution. Now what is the nature of the act charged in the indictment, giving the indictment the widest scope claimed for it? Simply that the defendant, being a registered physician, dispensed a small quantity of narcotic drugs to gratify the appetite of an addict. If the court will look into the record it will find that the case was submitted to the jury on the sole question: "Were these drugs dispensed in good faith, within the proper bounds of professional practice, or were they knowingly dispensed for the purpose of catering to the appetite or satisfying the cravings of one addicted to the use of narcotics?" The court, in giving that instruction, was following its understanding of the offense charged in the indictment. Where the quantity dispensed was large, as in the Behrman case, the taxation and registration features of the act were infringed by putting narcotic drugs into the hands of unregistered and unlicensed persons, who might dispense the same without paying the tax, and without the registration features intended to secure publicity as to all dealings in such drugs. It is

true that Mr. Justice Day said in the Behrman case:

> "Such so-called prescriptions could only result in the *gratification of a diseased appetite for these pernicious drugs,* or result in an unlawful parting with them to others, in violation of the act as heretofore interpreted in this court," etc.

But the constitutionality of the statute was not in question in that case, nor the question of the competency of Congress to punish a physician for the simple act of ministering to a diseased appetite for narcotic drugs. We submit that the record shows that defendant was charged and tried for an act not within the competency of Congress to punish, and which, on a proper construction of the law, Congress did not intend to punish.

The scheme of the act, namely, to make the selling or giving away of the drug in all cases an offense with an exception in favor of a registered physician who prescribes or administers "in the course of his professional practice only," aided by the holding of the courts that the prescription or administration must be in good faith as a medicine, and not to satisfy the cravings of an addict, is equivalent to a direct provision in the act that any physician, even though properly registered, and even though he keep all the records provided by the act, who prescribes or administers to

an addict to satisfy his cravings, shall be guilty of an offense and punishable as provided by Section 8 of the act. The constitutionality of that feature of the act has never been before this court.

In United States vs. Doremus, 249 U. S. 86, the Harrison Narcotic Act was sustained, as applied to that case, by a majority of this court, five to four. But that was a case where the quantity of the drug dispensed was unreasonably large, and where opportunity was thus given to unauthorized persons to sell and dispose of the drug without complying with the provisions of the act. The decision of the court appears to have been placed on that ground. After pointing out that acts proceeded against under the law as crimes must have some relation to the raising of revenue, the court proceeds:

> "Congress, with full power over the subject, short of arbitrary and unreasonable action, which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law. This case well illustrates the possibility which may have induced Congress to insert the provisions limiting sales to registered

> dealers, and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions. Ameris, being, as the indictment charges, an addict, may not have used this great number of doses for himself. He might sell some to others without paying the tax; at least, Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue."

It can hardly be said that the case is authority for bringing within the law, as a constitutional exercise of power, the act proceeded against in this case, the only effect of which was to cater to the appetite of an habitual drug user.

The succeeding case, Webb vs. United States, 249 U. S. 96, presented the question whether the first sentence of Section 2 of the Harrison Act, which prohibits retail sales of morphine by druggists to persons who have no physician's prescriptions, who have no order blank therefor, and who cannot obtain an order blank because not of the class to which such blanks are allowed to be used, was a constitutional exercise of power? That question was answered in the affirmative, and very properly so; but that is not the question presented here. More difficulty is found when considering the third question propounded in the Webb case, namely, whether the order of a physician for morphine to an habitual user, not issued in the course

of professional treatment in an attempted cure of the habit, but for the purpose of catering to the desire of the addict for the drug, could be considered a physician's prescription under exception (b) of Section 2 of the act, which question was answered in the negative. It may be said of the pronouncement of the court on that question that the mind of the court in answering it was not directed to any constitutional question, but simply to the construction of the language of the Narcotic Act. Certainly in the preceding case the court was careful to confine the scope of its decision to acts which Congress might constitutionally prohibit because necessary to the effectual enforcement of the Narcotic Act as a revenue measure.

In the later case of Jin Fuey Moy vs. United States, 254 U. S. 189, where language is used which would indicate that the law was intended to make criminal the act of a physician in dispensing narcotic drugs to a dealer, or *to satisfy the craving of an addict,* no constitutional question was raised. That case was again one in which a large and unreasonable quantity of the drug had been dispensed, and in which it was quite possible for the writer of the opinion to class in the same category, without thinking of the constitutional difficulty, an act which impaired the integrity of the

law, with an act which could only be made criminal by the legislature of a sovereign state.

Finally, the case of United States vs. Behrman, 258 U. S. 280, considered nothing except the sufficiency of the indictment in that case, and as we have heretofore seen, the indictment was sustained because of the enormously large quantity of the drug alleged to have been dispensed by the physician, thus affecting the revenue features of the law. It is true that Mr. Justice Day concludes the opinion by linking together as objectionable features of the acts charged in the indictment, "the gratification of a diseased appetite for these pernicious drugs," and "an unlawful parting with them to others in violation of the act," but since the learned Justice was considering the language of the narcotic act alone, the difficulty of including the two in the same constitutional class may not have occurred to him.

It appears then that this court has never had before it or considered or determined the precise question presented here, and if that be true, this case, we submit, is one calling for the revisory power of this court by the writ of certiorari. Not all of the District Courts, but most of them, are making the test of guilt in these narcotic cases to depend on whether the narcotic drug

was dispensed by the physician in good faith as a medicine, or was dispensed to satisfy the cravings of drug addicts, thus enforcing in their several districts a policy as to health and morals, which it belongs to the states alone to declare and enforce. As an illustration of the manner in which the narcotic act is considered and enforced in the District Courts, we cite, in addition to the instant case, Manning vs. United States, 287 Federal, 800; Melanson vs. United States, 256 Federal, 783; Thompson vs. United States, 258 Federal, 196.

If it be thought that the general language used in some of the cases in this court is such as to logically foreclose the question here raised, then it would seem, in view of the fact that there was a dissent by four out of the nine justices in each of the cases where the constitutional question was raised, that the matter ought now to be considered *de novo,* and an authoritative pronouncement made which will set the question at rest one way or the other.

THIRD.

There is one feature of this case to which candor compels us to call the attention of the court. The indictment was not attacked in the District Court, nor in

the Circuit Court of Appeals. But we understand the law to be that after judgment against an accused in a criminal case, if the indictment be bad in substance, or the judgment be erroneous, or any other defect in substance appears upon the face of the record, it is the office of a writ of error to open the case up for such judgment by an appellate court, as might and ought to have been rendered in the court below. Such was the common law. Archholds Crim. Practice & Pleading, Pomeroy's Notes, Vol. 1, p. 615.

We confess that we have not found, after careful examination of the decisions of this court, any statement of a similar rule, except inferentially, as in Frisbie vs. U. S. 157, U. S. 165. There are, of course, many decisions to the effect that the question must have been raised below, where appeals are brought to this court on the ground that the lower court was without jurisdiction or that the case involved the construction or application of the constitution of the United States. But where a writ of error is allowable as a matter of course, what questions it brings up and the limitations, if any, on the appellate court in hearing and determining them, depends on different considerations.

It has always been the rule of this court in civil cases that "anything appearing upon the record, which

would have been fatal upon a motion in arrest of judgment is equally fatal upon writ of error." Per Marshall, Ch. J. in Slocum vs. Pomeroy, 6 Cranch. 224. There appears to be every reason why the rule should equally apply in criminal cases.

We find, however, the rule in criminal cases thus stated by Circuit Justice Gilbert of the Ninth Circuit:

> "While neither of these motions is assignable as error in a Federal Appellate Court, such courts must always entertain the question whether an indictment charges an offense, and the question of the jurisdiction of the court below."
>
> *Borlaske vs. United States,* 279 Federal, 1.

If it be thought that the Supreme Court, as matter of practice, ought not to entertain on certiorari questions not raised below, we submit that the power to grant the writ, either before or after the judgment below, evidences that the exercise of the power was not intended to be limited by any question of mere practice.

Respectfully submitted,

W. H. PLUMMER,
TURNER, NUZUM & NUZUM,
Attorneys for Petitioner.

GEORGE TURNER,
of Counsel.